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Port Kelang Authority v Kuala Dimensi Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(W)-835–07 OF 2020
RAVINTHRAN, HASHIM HAMZAH AND LIM CHONG FONG JJCA
10 OCTOBER 2023

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Contract — Consideration — Failure of consideration — Parties entered into several contracts to construct and develop Port Klang Free Zone — Defendant was required to finance additional development cost under supplemental agreement for additional development works — Plaintiff was required to pay interest at rate of 5%pa — Parties entered into agreement to increase interest rate from 5% to 7.5 %pa — Whether there was consideration by defendant in return to plaintiff's agreement to increase interest rate — Whether defendant's defence in relation to consideration was pleaded — Whether all contracts between parties should be read together — Whether agreement void and unenforceable for want of consideration as stipulated under s 26 of Contracts Act 1950 — Whether plaintiff was estopped from challenging validity of agreement on ground of failure of consideration since plaintiff agreed in its own volition to enter into agreement with defendant — Whether doctrine of estoppel not applicable against clear requirement for consideration under s 26 of Contracts Act 1950 — Contracts Act 1950 ss 26 & 63

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The plaintiff had appointed the defendant as the turnkey contractor to construct and develop the Port Klang Free Zone ('PKFZ') project. For this purpose, the parties had entered into several contracts including the supplemental agreement for the additional development works dated 30 November 2005 ('ADW1'), an agreement on the supplemental agreement for the additional development works ('ADW2'), and the supplemental agreement for new additional development works ('NADW'). Under ADW1, the defendant was required to finance and advance the additional development costs for the sum of RM510.38m with the same repayable by the plaintiff with interest at the rate of 5%pa but the interest was increased to 7.5% under ADW2, ie, from RM107.123m to RM156.49m, which was an increase of RM49.367m. On 16 July 2020, the plaintiff filed an action against the defendant at the High Court for a declaration that ADW2 was null and void for want of consideration. The learned High Court judge ('the HCJ') dismissed the plaintiff's claim, hence, the present appeal. The plaintiff submitted that: (a) the HCJ had erred in his findings that the consideration for increasing the interest rate in ADW2 was the completion of additional works under ADW1, which was never pleaded by the defendant in its statement of defence; (b) ADW2 was void and unenforceable for want of consideration as stipulated under s 26 of the Contracts Act 1950 ('the CA 1950'); and (c) the HCJ had

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erred in his findings that the intention of the parties entering into ADW2 was to alleviate the financial difficulties faced by the defendant to carry out the additional works. The defendant submitted that: (i) all the contracts between the parties should be read together as they were all one composite contract; (ii) ADW2 was executed to vary the interest rate and the repayment sum in ADW1; and (iii) the plaintiff was estopped from challenging the validity of ADW2 since the plaintiff had agreed, in its own volition, to enter into ADW2 with the defendant.

Held, allowing the appeal with costs, setting aside the HCJ's decision, and ordering the refund of any payment made to the defendant by the plaintiff under the void agreement:

(1) The cardinal rule of civil litigation, especially in our adversarial justice system, was that the parties were bound and must abide by their pleadings. The parties to civil litigation were not allowed to adduce facts and issues which they had not pleaded. On the other hand, the courts should decide on facts and issues in strict compliance with the pleadings filed by the parties. Should the courts decide on an issue not raised by the parties in their pleadings, the decision was liable to be set aside (see para 25).

(2) The court found that there was nothing in the defendant's pleaded defence, either expressly or by implication, to suggest that the consideration for the interest rate increase for the defendant under ADW2 was the completion of works for the plaintiff under ADW1 as was found by the HCJ. Instead, the court agreed with the plaintiff that the defendant's statement of defence disclosed that in consideration of the defendant agreeing to complete additional works under the NADW, the plaintiff agreed to increase the interest rate in ADW1. Hence, the HCJ had erred in his finding that the consideration for the interest rate increase under ADW2 was the completion of works under ADW1, which the parties did not plead (see paras 22–24 & 30).

(3) The court disagreed with the defendant that all the contracts relating to the PKFZ should be read together as they formed one composite contract for the following reasons: (a) not all the contracts had been executed simultaneously or contemporaneously; and (b) the terms in ADW1 and NADW involved separate and distinct scopes of work for separate and distinct considerations. The court therefore agreed with the plaintiff that in construing the terms of the contracts, particularly ADW1, ADW2 and NADW, they should be looked into separately (see paras 47–49).

(4) Even if ADW2 was a variation of ADW1, the issue of whether there was a valid consideration from the defendant to the plaintiff in ADW2 would still arise. Pursuant to s 63 of CA 1950, if the parties to a contract agree to alter the said contract, the original contract need not be performed.

The keyword here is 'agree' to alter the contract. It is trite that a new contract is made when the parties agree to alter the original contract, provided that the parties can establish all the elements of a valid contract for the agreement to alter the original contract. If the parties cannot establish all the elements of a valid contract for the agreement to alter the original contract, the agreement is void, and the parties' obligations are only confined to the original contract (see paras 51–53).

(5) The court agreed with the plaintiff that ADW2 was executed to vary the interest chargeable by the defendant under ADW1 from 5%pa to 7.5%pa. As a result, the plaintiff was required to make an additional payment of RM49.367m to the defendant in July 2011 for works that the defendant was already obliged to carry out under the ADW1, which the plaintiff had already agreed to pay a total of RM677.123m for. However, there was no consideration from the defendant to the plaintiff in ADW2. Therefore, ADW2 was void and unenforceable for want of consideration under s 26 of the CA 1950 (see para 68).

(6) The learned HCJ erred in putting too much emphasis on the irrelevant fact that the parties' intention in entering into ADW2 was to alleviate the financial difficulties faced by the defendant in carrying out the additional works. Firstly, there was nothing of the sort mentioned in ADW2, even in the Recitals. Secondly, even if the plaintiff agreed to alleviate the defendant's financial difficulties, there was still no mention of what the plaintiff should get in return as consideration from the defendant in ADW2 (see paras 70–71).

(7) The court agreed with the plaintiff that the doctrine of estoppel which the defendant raised could not operate against the clear requirement for consideration in a valid contract as statutorily provided under s 26 of the CA 1950 unless the contract fell under any of the exceptions mentioned therein, which was not the case here. Therefore, the plaintiff in the present case was not estopped nor precluded from raising this issue to challenge the validity of ADW2 (see para 77).

[Bahasa Malaysia summary

Plaintif telah melantik defendan sebagai kontraktor turnkey untuk membina dan membangunkan projek Zon Bebas Pelabuhan Klang ('ZBPK'). Untuk tujuan ini, pihak-pihak telah memeterai beberapa kontrak termasuk perjanjian tambahan untuk kerja-kerja pembangunan tambahan bertarikh 30 November 2005 ('ADW1'), perjanjian mengenai perjanjian tambahan untuk kerja-kerja pembangunan tambahan ('ADW2'), dan perjanjian tambahan untuk kerja-kerja pembangunan tambahan Baharu ('NADW'). Di bawah ADW1, defendan dikehendaki membiayai dan mendahulukan kos pembangunan tambahan untuk jumlah RM510.38 juta dengan bayaran balik untuk jumlah tersebut dibuat oleh plaintif pada kadar faedah 5% setahun tetapi faedah

tersebut telah dinaikkan kepada 7.5 % di bawah ADW2, iaitu, daripada RM107.123 juta kepada RM156.49 juta, iaitu peningkatan sebanyak RM49.367 juta. Pada 16 Julai 2020, plaintif memfailkan tindakan terhadap defendan di Mahkamah Tinggi untuk pengisytiharan bahawa ADW2 adalah terbatal dan tidak sah kerana tiada balasan. Hakim Mahkamah Tinggi yang bijaksana ('HMT') menolak tuntutan plaintif, oleh itu, rayuan semasa. Plaintif berhujah bahawa: (a) HMT telah terkhilaf dalam dapatannya bahawa balasan untuk meningkatkan kadar faedah dalam ADW2 adalah menyiapkan kerja tambahan di bawah ADW1, yang tidak pernah diplid oleh defendan dalam pernyataan pembelaannya; (b) ADW2 adalah terbatal dan tidak boleh dikuatkuasakan kerana ketiadaan balasan seperti yang ditetapkan di bawah s 26 Akta Kontrak 1950 ('AK 1950'); dan (c) HMT telah terkhilaf dalam dapatannya bahawa niat pihak-pihak memasuki ADW2 adalah untuk mengurangkan kesulitan kewangan yang dihadapi oleh defendan untuk menjalankan kerja-kerja tambahan tersebut. Defendan berhujah bahawa: (i) semua kontrak antara pihak-pihak hendaklah dibaca bersama kerana kesemuanya adalah satu kontrak gabungan; (ii) ADW2 telah dilaksanakan untuk mengubah kadar faedah dan jumlah bayaran balik dalam ADW1; dan (iii) plaintif telah dihalang daripada mencabar keabsahan ADW2 kerana plaintif telah bersetuju, atas kerelaannya sendiri, untuk memasuki ADW2 dengan defendan.

Diputuskan, membenarkan rayuan dengan kos, mengenepikan keputusan HMT, dan memerintahkan pembayaran balik apa-apa bayaran yang dibuat kepada defendan oleh plaintif di bawah perjanjian yang tidak sah:

(1) Peraturan utama litigasi sivil, terutamanya dalam sistem keadilan 'adversarial' kita, ialah pihak-pihak terikat dan mesti mematuhi pliding mereka. Pihak-pihak dalam litigasi sivil tidak dibenarkan mengemukakan fakta dan isu yang tidak diplidkan. Sebaliknya, mahkamah harus memutuskan fakta dan isu dengan mematuhi pliding yang difailkan oleh pihak-pihak. Sekiranya mahkamah memutuskan isu yang tidak dibangkitkan oleh pihak-pihak dalam pliding mereka, keputusan tersebut boleh diketepikan (lihat perenggan 25).

(2) Mahkamah mendapati bahawa tiada apa-apa dalam pembelaan defendan yang diplidkan, sama ada secara nyata atau secara tersirat, untuk mencadangkan bahawa balasan untuk kenaikan kadar faedah bagi defendan di bawah ADW2 adalah penyiapan kerja untuk plaintif di bawah ADW1 seperti yang didapati oleh HMT. Sebaliknya, mahkamah bersetuju dengan plaintif bahawa pernyataan pembelaan defendan mendedahkan bahawa sebagai balasan kepada persetujuan defendan untuk menyiapkan kerja tambahan di bawah NADW, plaintif bersetuju untuk meningkatkan kadar faedah dalam ADW1. Oleh itu, HMT telah terkhilaf dalam dapatannya bahawa balasan untuk kenaikan kadar faedah di bawah ADW2 adalah penyiapan kerja di bawah ADW1, yang mana

ini tidak diplidkan oleh pihak-pihak (lihat perenggan 22–24 & 30).

(3) Mahkamah tidak bersetuju dengan defendan bahawa semua kontrak yang berkaitan dengan ZBPK harus dibaca bersama kerana ia membentuk satu kontrak gabungan atas sebab-sebab berikut: (a) bukan semua kontrak tersebut telah dilaksanakan secara sekali gus atau serentak; dan (b) terma-terma dalam ADW1 dan NADW melibatkan skop kerja yang berasingan dan berbeza untuk balasan yang berasingan dan berbeza. Oleh itu, mahkamah bersetuju dengan plaintif bahawa dalam mentafsir terma-terma kontrak-kontrak tersebut, terutamanya ADW1, ADW2 dan NADW, ia harus dilihat secara berasingan (lihat perenggan 47–49).

(4) Andai kata ADW2 adalah variasi ADW1, isu sama ada terdapat balasan yang sah daripada defendan kepada plaintif dalam ADW2 masih akan timbul. Menurut s 63 AK 1950, jika pihak-pihak kepada kontrak setuju untuk mengubah kontrak tersebut, kontrak asal tidak perlu dilaksanakan. Kata kunci di sini ialah 'setuju' untuk mengubah kontrak. Telah menjadi undang-undang yang mantap bahawa kontrak baru dibuat apabila pihak-pihak bersetuju untuk mengubah kontrak asal, dengan syarat pihak-pihak boleh membuktikan semua elemen kontrak yang sah untuk perjanjian yang mengubah kontrak asal tersebut. Jika pihak-pihak tidak dapat membuktikan semua elemen kontrak yang sah untuk perjanjian yang mengubah kontrak asal tersebut, maka perjanjian tersebut tidak sah, dan kewajipan pihak-pihak hanya terhad kepada kontrak asal (lihat perenggan 51–53).

(5) Mahkamah bersetuju dengan plaintif bahawa ADW2 telah dilaksanakan untuk mengubah faedah yang dikenakan oleh defendan di bawah ADW1 daripada 5% setahun kepada 7.5% setahun. Akibatnya, plaintif dikehendaki membuat bayaran tambahan sebanyak RM49.367 juta kepada defendan pada Julai 2011 untuk kerja-kerja yang defendan sememangnya bertanggungjawab untuk melaksanakan di bawah ADW1, yang mana plaintif telah pun bersetuju untuk membayar sejumlah RM677.123 juta. Bagaimanapun, tiada balasan daripada defendan kepada plaintif dalam ADW2. Oleh itu, ADW2 adalah terbatal dan tidak boleh dikuatkuasakan kerana ketiadaan balasan di bawah s 26 AK 1950 (lihat perenggan 68).

(6) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf kerana terlalu menekankan fakta tidak relevan bahawa niat pihak-pihak untuk memasuki ADW2 adalah untuk mengurangkan kesulitan kewangan yang dihadapi oleh defendan dalam melaksanakan kerja-kerja tambahan tersebut. Pertama, perkara tersebut tidak disebut langsung dalam ADW2, walaupun dalam 'Recitals'. Kedua, walaupun plaintif bersetuju untuk meringankan masalah kewangan defendan, masih tidak dinyatakan apa yang plaintif patut dapat sebagai balasan daripada defendan dalam ADW2 (lihat perenggan 70–71).

(7) Mahkamah bersetuju dengan plaintif bahawa doktrin estoppel yang dibangkitkan oleh defendan tidak boleh beroperasi terhadap keperluan yang jelas untuk balasan dalam kontrak yang sah seperti yang diperuntukkan mengikut undang-undang di bawah s 26 AK 1950 melainkan kontrak tersebut termasuk di bawah mana-mana pengecualian yang disebut di dalam peruntukan tersebut, yang tidak berlaku di sini. Oleh itu, plaintif dalam kes ini tidak dihalang atau dikecualikan daripada membangkitkan isu ini untuk mencabar keabsahan ADW2 (lihat perenggan 77).]

Cases referred to

555 Film Sdn Bhd & Ors v Adamancy Construction Sdn Bhd [2023] MLJU 986; [2023] 1 LNS 884, CA (folld)

Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commerce International Bank Ltd [1979 A No 65] [1982] QB 84, CA (refd)

Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor [2014] 4 MLJ 619, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41b; [1978] 1 LNS 32, PC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Idris bin Haji Mohamed v Ng Ah Siew [1935] 1 MLJ 257, CA (refd)

Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd) [2018] 2 MLJ 292, FC (refd)

International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another [2013] SGCA 55; [2014] 1 SLR 130, CA (refd)

International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another [2012] SGHC 226; [2013] 1 SLR 973, HC (refd)

LYL Hooker Sdn Bhd v Tevanaigam Savisthri & Anor [1987] 2 MLJ 52, SC (refd)

Manks v Whiteley [1912] 1 Ch 735, CA (refd)

Mohamed Isa & Ors v Abdul Karim & Ors [1970] 2 MLJ 165, HC (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)

Oakwell Engineering International Pte Ltd v PCM Feam (M) Sdn Bhd [2014] 11 MLJ 175, HC (folld)

Paragon Union Bhd v Prestamewah Development Sdn Bhd & Anor and another appeal [2018] 4 MLJ 307; [2018] 1 LNS 1049, CA (refd)

RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188, FC (refd)

Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Anor [2016] 5 MLJ 1; [2016] 7 CLJ 823, FC (refd)

Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) [2014] 3 MLJ 785, FC (refd)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 MLJ 257, FC (refd)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 MLJ 324, CA (refd)
Sritharan Naidu a/l Sundara Rajoo v Dato' Dr Gengatharan @ Jeganathan a/l Venkatesan & Anor [2019] MLJU 289; [2019] 1 LNS 535, CA (refd)
Thomas (Watt or Thomas) v Thomas [1947] AC 484, HL (refd)
UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2010] 9 CLJ 785, FC (refd)
Vignesh Naidu a/l Kuppusamy Naidu v Prema Bonanza Sdn Bhd and another appeal [2023] 2 MLJ 776; [2023] 4 CLJ 715, CA (refd)
Whiteley v Delaney [1914] AC 132, HL (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152; [1990] 1 CLJ Rep 330, SC (refd)
Yong Mok Hin v United Malay States Sugar Industries Ltd [1967] 2 MLJ 9, FC (refd)

Legislation referred to

Contracts Act 1950 ss 2(e), (d), 26, 63
Port Authorities Act 1963

Appeal from: *Port Kelang Authority lwn Kuala Dimensi Sdn Bhd* [2020] MLJU 1156 (High Court, Shah Alam)

Nimalan Devaraja (with Wong Shun Yong) (Skrine) for the appellant.
Prem Ramachandran (with Lee Shoue Jie) (Kumar Partnership) for the respondent.

Hashim Hamzah JCA:

INTRODUCTION

[1] For ease of reference, the parties will be referred to as the plaintiff and the defendant, as in the High Court below.

THE BRIEF FACTS

[2] Briefly, the facts in the present case are as follows.

[3] In 1993, the Government of Malaysia sought to develop and transform Port Klang into a national load centre and regional transhipment hub. The Port Klang Free Zone ('PKFZ') project was initiated and approved to achieve this end. The PKFZ project was a mixed development project covering

A approximately 1,000 acres of land at Pulau Indah, Klang, Selangor.

[4] According to the Port Authorities Act 1963, the plaintiff was established on 1 July 1963 as a statutory corporation under the jurisdiction of the Ministry of Transport ('MOT'). The plaintiff had appointed the defendant as a turnkey contractor to construct and develop the PKFZ project.

[5] Following the defendant's appointment, the plaintiff and the defendant entered into various contracts concerning the PKFZ project, among others, the development agreement dated 27 February 2003 ('DA1'), the supplemental agreement dated 26 May 2003 ('DA2'), and the supplemental agreement to DA1 dated 27 March 2004 ('DA3').

[6] On 30 November 2005, the plaintiff and the defendant entered into a supplemental agreement for the additional development works ('ADW1') in which the defendant was appointed to design, construct, finance and complete additional works, including works on junction improvements to the PKFZ, construction of electrical infrastructure and construction of a business-class hotel near the proposed exhibition centre. The defendant was required under this contract to finance and advance the additional development costs for the sum of RM510.38m with the same repayable by the plaintiff with interest at the rate of 5%pa.

[7] On 26 April 2006, the parties entered into an agreement on the supplemental agreement for additional development works ('ADW2') in which the parties have agreed that the interest chargeable on the additional development works was increased from 5% to 7.5%, ie, from RM107.123m to 156.49m, which was an increase of RM49.367m.

[8] On the same day, the parties also executed the supplemental agreement For new additional development works to DA1 ('NADW') in which the defendant was appointed as a turnkey contractor to design, construct, finance and complete new additional development works, which comprised of concrete trenching, electrical works, civil infrastructure works, road works for an estimated cost of RM335.8m with the same repayable by the plaintiff with interest at the rate of 7.5%pa.

[9] On 16 July 2020, the plaintiff filed an action at the High Court, seeking a declaration that the ADW2 is null and void for want of consideration. The matter went for a full trial, and the learned High Court judge ('HCJ') dismissed the plaintiff's claim because the plaintiff failed to prove its case against the defendant on the balance of probabilities. Aggrieved by the said decision, the plaintiff filed this appeal.

THE MAIN ISSUE BEFORE THE HIGH COURT

[10] The core issue to be determined by the learned HCJ was whether ADW2 was entered between the parties without consideration and, therefore, null and void under s 26 of the Contracts Act 1950 ('the CA 1950').

FINDINGS OF THE LEARNED HCJ

[11] After a full trial, the learned HCJ decided that ADW2 was entered between the parties with due consideration. Therefore, the learned HCJ decided that ADW2 is a valid and enforceable contract between the parties.

[12] Primarily, in reaching his decision, the learned HCJ found that:

(a) ADW2 should be read together with ADW1, and therefore, the consideration for increasing the interest rate in ADW2 for the defendant is the completion of additional works under ADW1 for the plaintiff;

(b) the plaintiff did agree to enter into ADW2 with the defendant in the first place; and

(c) the parties intended to enter into ADW2 to alleviate the financial difficulties faced by the defendant to carry out the additional works as agreed in ADW1 and NADW.

THE PLAINTIFF'S GROUNDS OF APPEAL

[13] The plaintiff's grounds of appeal are extensive and can be seen in its memorandum of appeal.

[14] Before us, the plaintiff focused their submission on these salient points. The plaintiff submitted that the learned trial judge had erred both in law and fact in his findings that:

(a) the consideration for increasing the interest rate in ADW2 is the completion of additional works under ADW1, which was never pleaded by the defendant in its statement of defence;

(b) even though the plaintiff agreed to enter into ADW2 with the defendant, the plaintiff is not estopped from claiming that the contract was void for want of consideration under s 26 of the CA 1950; and

(c) the intention of the parties in entering into ADW2 was to alleviate the financial difficulties faced by the defendant to carry out the additional works under ADW1 and NADW by relying on the evidence of SD1, who

admitted during trial that he was not involved during the negotiation stage of the relevant contracts and on extrinsic evidence outside of the four corners of ADW2.

LAW ON APPELLATE INTERVENTION

[15] It is trite that when a matter comes up on appeal, an appellate court must determine whether the trial court had arrived at its decision or finding correctly based on the relevant law and established evidence. It is also trite that an appellate court will not generally intervene with a trial court's decision unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the decision of the trial court is arrived at without judicial appreciation of the evidence (see *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785, *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b; [1978] 1 LNS 32, *Thomas (Watt or Thomas) v Thomas* [1947] AC 484, *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309, and *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 (FC)).

OUR FINDINGS

[16] After carefully perusing the appeal records and hearing the submissions by both parties to this appeal, we have come to a unanimous decision, and our decision is as follows.

First issue: Decision on an issue which was not pleaded

[17] The plaintiff submitted that the learned HCJ had erred in his finding that the consideration for the interest rate increase in ADW2 was the completion of the additional works under ADW1. In his grounds of judgment, the learned HCJ states:

> [20] Berasaskan fakta-fakta tersebut, jelaslah bahawa plaintif bersetuju dengan permohonan defendan untuk menaikkan kadar faedah bagi pembiayaan kerja-kerja tambahan di bawah perjanjian ADW1 dan persetujuan tersebut adalah dilaksanakan melalui perjanjian ADW2. Adalah didapati bahawa perjanjian ADW1 dan ADW2 perlulah dibaca secara bersama. Dengan kata lain, *terma-terma berkait dengan kerja-kerja tambahan di bawah perjanjian ADW1 adalah juga merupakan sebahagian daripada terma-terma di bawah perjanjian ADW2.* Dengan itu, *penyiapan kerja-kerja tambahan oleh defendan seperti mana yang disyaratkan di bawah perjanjian ADW1 adalah juga merupakan balasan berharga kepada plaintif di bawah perjanjian ADW2.* (Emphasis added.)

[18] According to the plaintiff, the defendant never pleaded in its statement

of defence that the consideration for the interest rate increase under ADW2 is the completion of additional works for the plaintiff under ADW1.

[19] The plaintiff brought our attention to the defendant's statement of defence, which states:

> 3.6.3 Concurrently, *in consideration of the Defendant also undertaking the additional financial burden of financing the new additional development works under the NADW having already agreed to finance the additional development works under ADW1,* the Plaintiff agreed to revise the interest provision in ADW1 upwards, from 5%pa to 7.5%pa, calculated on a yearly basis by an Agreement on the supplemental agreement for the additional development works dated 30 November 2005 ('ADW2').
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> ...
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> 5.4 Therefore, *in consideration of the Defendant agreeing to enter into NADW, the Plaintiff agreed to alleviate such financial burden of the Defendant by increasing the rate of interest* payable to the Defendant in respect of the additional development works awarded to the Defendant under ADW1 from 5% to 7.5%pa. (Emphasis added.)

[20] In reply, the defendant reiterated that its pleaded defence was that all contracts on the development of the PKFZ project ought to be read together, and the consideration for ADW2 was to alleviate the defendant's financial difficulties in undertaking to complete the works in ADW1 and NADW.

[21] The defendant also quoted the above paragraphs in its statement of defence. In addition, the defendant also quoted paras 4 and 5.3 of its statement of defence, which state:

> 4. In the circumstances, the development of the Land, and negotiations with regard to such development, were a continuing process. The DA1, DA2, DA3, ADW1, ADW2 and NADW were *records of the terms and conditions arrived at between the Plaintiff [PKA] and the Defendant [KDSB] in their continuous negotiations to develop the Land.*
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> ...
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> 5.3 *Undertaking the new additional development works and advancing the cost and expenditure new additional development works would cause the Defendant [KDSB] financial strain as the Defendant [KDSB] was already financing the works under ADW1.* Further and/or alternatively, the Defendant [KDSB] also undertook the risks involved in the completion of the works under ADW1 and NADW. (Emphasis added.)

[22] After perusing the whole of the defendant's pleaded defence, specifically those highlighted before us above, we found that there is nothing in the defendant's pleaded defence, either expressly or by implication, to suggest that the consideration for the interest rate increase for the defendant under the

ADW2 was the completion of works for the plaintiff under ADW1.

[23] Instead, we agree with the plaintiff that the defendant's statement of defence disclosed that in consideration of the defendant agreeing to complete additional works under the NADW, the plaintiff agreed to increase the interest rate in ADW1.

[24] Hence, the learned HCJ's finding that the consideration for ADW2 was the completion of the additional works under ADW1 was clearly misconstrued since the defendant did not plead this issue or fact.

[25] The cardinal rule of civil litigation, especially in our adversarial justice system, is that the parties are bound and must abide by their pleadings. The parties to civil litigation are not allowed to adduce facts and issues which they have not pleaded. On the other hand, the courts should decide on facts and issues in strict compliance with the pleadings filed by the parties. Should the courts decide on an issue not raised by the parties in their pleadings, the decision is liable to be set aside.

[26] In *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ Rep 330, the then Supreme Court held in no uncertain terms that:

> Under our adversary system of procedure, for a judge to disregard the rule by which counsels are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is ...
>
> *As the High Court had made a decision on an issue which was not raised by the parties in their pleadings the appeal in this case must be allowed and the order of the learned judge in dismissing the plaintiff's claim set aside ...* (Emphasis added.)

[27] The Federal Court in *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188 held that:

> [33] Second, the proposition of the Court of Appeal was not even pleaded by the respondent. The respondent's cause of action against the appellant was for breach of contract. Nowhere in the respondent's pleading, expressly or by implication, can we detect a claim for breach of a joint venture agreement arising out of a fiduciary duty placed upon the appellant in the capacity as principal of an agent. *It is a cardinal rule in civil litigation that the parties must abide by their pleadings.* This is trite as can be seen from the decision of this court in *Menah Sulong v Lim Soo & Anor* [1983] 1 CLJ 26 where Ong Hock Thye CJ said:
>
> > *I think it is necessary in this case to emphasise once again that the courts should give their decision in strict compliance with the pleadings. As Lord Radcliffe said in Esso Petroleum Co Ltd & Anor v Southport Corporation* [1956] 2 WLR 81 at p 91:

> If an appellate court is to treat reliance as pedantry or mere formalism I do not see what part they play in our trial system.

[34] In fact, the Court of Appeal itself has reiterated this in *Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750; [1997] 2 CLJ 79 where Gopal Sri Ram JCA (as he then was) said:

> It is trite law that a party is bound by its pleadings.

[35] On this, we would like to add that *it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other.* The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts. (Emphasis added.)

[28] On a similar note, the Federal Court in *Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd)* [2018] 2 MLJ 292 held as follows:

> [27] *It is settled law that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded: Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1*, State Government of Perak v Muniandy* [1986] 1 MLJ 490, *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141; [2009] 6 CLJ 232. In *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428;; [1991] 1 CLJ Rep 239 it was held that where a vital issue was not raised in the pleadings, it could not be allowed to be granted and to succeed on appeal. *A decision based on an issue which was not raised by the parties in their pleadings is liable to be set aside: Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152. In *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157 the Federal Court set aside the judgment of the trial judge as it was decided on an issue not raised on the pleadings. In that case the trial judge erred in concluding that the pleadings included a claim for breach of contract as well as a claim for libel. (Emphasis added.)

[29] In *Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor* [2014] 4 MLJ 619, this court, speaking through Abdul Malik Ishak JCA (as he then was), held that:

> [67] This appeal also centred on the pleadings of the parties. It is trite that the parties are bound by their pleadings. *The court is not entitled to decide a suit on a matter that is not pleaded.* It is a fundamental rule of natural justice that the opposite party must be informed of any adverse issue so that the other party has the opportunity to challenge it and not be caught by surprise. *It is also salutary to mention that when the trial court decides on an issue that is not pleaded, the judgment can be set aside.* The authorities on these points are legion and they are easily available in the law journals. Suffice for this exercise to cite a few of them: *Wong See Leng v C Saraswathy*

Ammal [1954] 1 MLJ 141 (CA) at p 142; *Koh Siak Poo v Sayang Plantation Bhd* [2002] 1 MLJ 65 (CA); *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600 (CA); *Lever Brothers, Limited, And Others v Bell And Another* [1931] 1 KB 557; *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 at p 155; *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615; *S Manickam & Ors v Ismail bin Mohamad & Ors* [1997] 2 MLJ 90; *Narayanan v Kannamah* [1993] 331 MLJ 730; *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22 (FC); *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 (SC) at p 418; *Wisma Punca Emas Sdn Bhd v Dr Donal R O' Holohan* [1987] 1 MLJ 393 (SC); *Gimsterm Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 (SC); *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633; *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157 (FC); *Ria Enterprise & Ors v MBF Finance Bhd* [2000] MLJU 744; [2001] 1 CLJ 687; *Rosita bte Baharom (an infant) v Sabedin bin Salleh* [1993] 1 MLJ 393 (SC); *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 (FC); *Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 1 MLJ 577 (FC); *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417 (CA); and *Lim Tiong Huai v Wang Swee Teck (trading as Wang Plumbering & Electric Co)* [2004] 1 MLJ 638. (Emphasis added.)

[30] Based on the above, we found that the learned HCJ had erred in his finding that the consideration for the interest rate increase under ADW2 is the completion of works under ADW1, which the parties did not plead.

[31] Therefore, we find merits in this issue, which the plaintiff raised.

[32] To avoid doubt, we reject all of the defendant's arguments, which may suggest that the consideration for the interest rate increase under ADW2 is the completion of works under ADW1 since the defendant did not plead this issue.

Second issue: Applicability of the s 26 of CA 1950

[33] With regard to this issue, the plaintiff submitted that the ADW2 was void and unenforceable for want of consideration as stipulated under s 26 of the CA 1950.

[34] The general position of the law is that a contract without consideration is void. The term consideration is defined under s 2(d) of the CA 1950 as follows:

> (d) when, *at the desire of the promisor, the promisee* or any other person *has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something,* such act or abstinence or promise *is called a consideration for the promise;* (Emphasis added.)

[35] The exception to the general rule is stipulated in the provisos to s 26 of

the CA 1950, which states that:

Section 26. Agreement without consideration, void, unless —

An agreement made without consideration is void, unless — it is in writing and registered

(a) it is *expressed in writing and registered under the law* (if any) for the time being *in force for the registration of such documents,* and is *made on account of natural love and affection* between *parties standing in a near relation* to each other;

or is a promise to compensate for something done

(b) it is a *promise to compensate,* wholly or in part, *a person who has already voluntarily done something for the promisor, or* something which the promisor was *legally compellable to do;* or

or is a promise to pay a debt barred by limitation law.

(c) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, *to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.*

In any of these cases, such an agreement is a contract.

Explanation 1 — Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2 — An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the court in determining the question whether the consent of the promisor was freely given. (Emphasis added.)

[36] This is also in line with s 2(e) of the CA 1950 which states that:

(e) every promise and every set of promises, *forming the consideration for each other, is an agreement;* (Emphasis added.)

[37] In the present appeal, the plaintiff submitted that based on the plain reading of the terms in ADW2, there is no consideration on the defendant's part to the plaintiff for the interest rate increase from 5%pa to 7.5%pa. The plaintiff claimed that the sole purpose of ADW2 was to increase the interest chargeable under ADW1, which resulted in the additional payment of RM49.367m to the defendant. Under ADW2, there was nothing provided by the defendant in return as consideration.

[38] We wish to note at the outset that it was not the defendant's position that the ADW2 falls under any of the provisos under s 26 of the CA 1950.

[39] The defendant's first contention is that all contracts between the parties

on the development of the PKFZ project should be read together as they were all one composite contract. This is because the PKFZ was a continuing development project from 2003 to 2008, which involved a series of transactions and contracts between the plaintiff and the defendant. It was also submitted that there was a nexus between ADW2 and ADW1, and the effect of ADW2 was to vary the contractual terms under ADW1. It was further submitted that the ADW2 should be read together with ADW1.

[40] The defendant relied on the dissenting judgment of Fletcher Moulton LJ in *Manks v Whiteley* [1912] 1 Ch 735 (UKCA) (which was approved by the House of Lords on appeal as reported in *Whiteley v Delaney* [1914] AC 132) that when several documents forming part of one transaction are executed contemporaneously, all the documents must be read together as if they are one.

[41] This principle was adopted by our courts as can be seen in *Idris bin Haji Mohamed v Ng Ah Siew* [1935] 1 MLJ 257 in which this court, through Terrell J (as he then was) at p 261 of the report, said:

> It is a well known rule of construction that *where the arrangement between parties is contained in several documents all executed simultaneously, all the documents must be read together to ascertain the intention of the parties, and it is a corollary from this that the intention must be gathered from the documents as a whole.* It has been held, for example, that when a bill of sale and a mortgage of a reversionary interest were executed simultaneously and related to the same debt, the bill of sale could be defeated by a condition contained only in the mortgage, *Edwards v Marcus* (1894) 1 QB 587 (see also the dissenting judgment of Fletcher Moulton LJ in *Manks v Whiteley* , which was approved on appeal to the House of Lords, sub-nominee *Whiteley v Delaney* [1914] AC 132). (Emphasis added.)

[42] See *Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165 (HC).

[43] The defendant also referred to *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324 (CA) (which was upheld by the Federal Court as reported in *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257). In this case, Gopal Sri Ram JCA (as he then was), in referring to the principle and the relevant authorities above, held as follows:

> In my judgment, there is merit in the appellants' argument that the agreements in this case must be read together. Indeed, as I have said, the respondents make no issue about the point at all. *When the agreements are read together, what comes across with sharp clarity is the fact that a breach of any of the terms of one of the agreements triggers a breach of all the agreements.* This is achieved by cl 2 of the supplementary agreement. In other words, all these agreements are to be looked upon as forming part and parcel of one and the same transaction. (Emphasis added.)

[44] Furthermore, the defendant cited the case of *Paragon Union Bhd v Prestamewah Development Sdn Bhd & Anor and another appeal* [2018] 4 MLJ 307; [2018] 1 LNS 1049 in which this court held:

> 45.6 In *Sri Kelangkota-Rakan Engineering JV Sdn Bhd* [2001] 1 MLJ 324; [2001] 1 CLJ 779, which was referred to, by the learned trial judge, this court held that:
>
> > When all the agreements are read together what comes across with sharp clarity is the fact that a breach of any of the terms of one of the agreements triggers a breach of all the agreements ... In other words all these agreements are to be looked upon as forming part and parcel of one and the same transaction. (Emphasis added.)
>
> 45.7 Applying what was held in *Sri Kelangkota-Rakan Engineering JV Sdn Bhd* to the facts in our present appeal, the breach of the SPA with Kong See Kuan does not trigger the breach of the SPA with Tan Onn Poh. That was the point of submission by the defendants. However, that is not the only aspect to be looked at here. The two SPAs were entered into by the plaintiffs and it is to be looked into, with the other agreements, to ascertain *the intention of the agreements being executed, that is to buy over AASB shares.* The two SPAs (together with the other agreements) *form part of a transaction to gain control of Paragon Union Berhad.* In the case of *Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165; [1970] 1 LNS 82, it was held that:
>
> > It is settled rule of construction that where several documents forming part of one transaction are executed contemporaneously, all the documents must be read together as if they are one (see *Manks v Whiteley* [1912] 1 Ch 735). This principle was followed in *Idris bin Haji Mohamed v Ng Ah Siew* [1935] MLJ 257; [1935] 1 LNS 15, where Terrell J at p 261 said:
> >
> > It is a well known rule of construction that where the arrangement between parties is contained in several documents all executed simultaneously, all the documents must be read together to ascertain the intention of the parties, and it is corollary from this that the intention must be gathered from the documents as a whole. (Emphasis added.)
>
> The operational words as stated in *Mohamed Isa & Ors v Abdul Karim & Ors* are *'several documents forming one transaction' and also where the arrangement between the parties is contained in several documents executed simultaneously'.* (Emphasis added.)

[45] Next, the defendant also relied on the Singapore High Court's case of *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2012] SGHC 226; [2013] 1 SLR 973. Without going into the details of the case, suffice to say that this decision does not bind us. In fact, the decision has been overruled by the Singapore Court of Appeal as reported in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2013] SGCA 55; [2014] 1 SLR 130.

[46] In the present appeal, we disagree with the defendant that all of the contracts relating to the PKFZ should be read together as they formed one

composite contract for the following reasons.

[47] Firstly, it is to be noted that not all of the contracts have been executed simultaneously or contemporaneously, particularly ADW1, ADW2 and NADW. It can be seen that only ADW2 and NADW were executed on the same day. However, the additional works to be carried out by the defendant in ADW1 and NADW differ.

[48] Secondly, the terms in ADW1 and NADW involve separate and distinct scopes of work for separate and distinct considerations. The contractual obligations and the considerations in these contracts are different and are supposed to be carried out by the parties at different times. There is no common objective to be achieved from these contracts. The scope of works, obligations and considerations are separate and distinct in each contract, even though they involve the same project. Hence, it cannot be said that a breach of any of the terms of the contracts would trigger a breach of all of the contracts relating to the PKFZ project. All of the authorities relied upon by the defendant seem to support our view.

[49] Based on the preceding reasons, we agree with the plaintiff that in construing the terms of the contracts, particularly ADW1, ADW2 and NADW, they should be looked into separately.

[50] The defendant's second contention is that ADW2 was executed to vary the interest rate and the repayment sum in ADW1. According to the defendant, the parties are still bound by the terms in ADW1 save the variation concerning the increased interest rate and repayment sum payable by the plaintiff, which should follow what has been agreed upon in ADW2.

[51] For the sake of argument, even if ADW2 is a variation of ADW1, the issue of whether there is a valid consideration from the defendant to the plaintiff in ADW2 will still arise.

[52] Under the law, if the parties to a contract agree to alter the said contract, the original contract need not be performed. This can be seen under s 63 of the CA 1950, which states:

> Section 63 Effect of novation, rescission and alteration of contract.
>
> *If the parties to a contract agree to* substitute a new contract for it, or to rescind or *alter it,* the *original contract need not be performed.*
>
> ILLUSTRATIONS

(a) A owes money to B under a contract. It is agreed between A, B and C that B shall henceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

(b) *A owes B RM10,000. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for RM5,000 in place of the debt of RM10,000. This is a new contract and extinguishes the old.*

(c) A owes B RM1,000 under a contract B owes C RM1,000. B orders A to credit C with RM1,000 in his books, but C does not assent to the agreement. B still owes C RM 1,000, and no new contract has been entered into. (Emphasis added.)

[53] The keyword here is 'agree' to alter the contract. It is trite that a new contract is made when the parties agree to alter the original contract, provided that the parties can establish all of the elements of a valid contract for the agreement to alter the original contract. If the parties cannot establish all of the elements of a valid contract for the agreement to alter the original contract, the agreement is void, and the parties' obligations are only confined to the original contract.

[54] In *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9, the Federal Court held:

> The equivalent section in the Indian Contract Act is s 62. The scope of this section was considered in *Balak Ram Telu* AIR 1935 Lahore 897. *In that case the parties had agreed to substitute a bond for money due on an account but the plaintiff had sued the defendant on the original contract.* The following observations of Din Mohamed J seem relevant, and I quote:
>
> > *From the clear wording of this section it will appear that it is not always necessary to prove that a new contract had been substituted. It is enough if an alteration in the original contract is proved…* The plaintiff claimed interest on the original account on the basis of an oral agreement. The bond, however, did not provide for it. Further the original entry could be sued upon at once while the bond provided for payment by instalments. It is clear therefore that the terms of the original contract were varied in this case and this variation will, in my opinion, be sufficient to absolve the defendant from performance of his original contract In the authorities cited above substitution of a new contract alone appears to have been pleaded and considered. So far as I have been able to see there is no reference therein to the variation of the terms of the original contract. Those cases therefore are no authority for the proposition that even if the terms were varied, the plaintiff can still fall back upon the original contract. (Emphasis added.)

[55] In the Supreme Court case of *LYL Hooker Sdn Bhd v Tevanaigam Savisthri & Anor* [1987] 2 MLJ 52, it was held that:

> Novation is a new contract. It extinguishes rights and obligations under the old contract for which the new contract is made. *Being a new contract, there must be*

consent by all the parties and there must be consideration, the rights and obligations under it are not those transferred from the old contract which is already extinguished. (Emphasis added.)

[56] Recently, this court faced a similar issue in *555 Film Sdn Bhd & Ors v Adamancy Construction Sdn Bhd* [2023] MLJU 986; [2023] 1 LNS 884. We agree with the decision of this court, which held as follows:

> [21] Under the law, if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. See s 63 of the Contract Act 1950. *The alteration or commonly referred to as a 'variation' of a contract has a far-reaching effect. It modifies the right or obligation of the contracting parties, and it relieves the contracting parties from performing the original contract. That's why the law used the words 'if the parties to a contract agree to alter' in the variation of a contract.* In other words, the parties must mutually agree to vary the contract and the parties must mean or intend that the variation will permanently affect their rights. *As a basic requirement under the contract law, the agreement to vary a contract will need to be supported by consideration, that is, something of value must be given in exchange for the variation. If there is no such consideration, then the validity of the variation can be subject to challenge.*
>
> [22] Based on the consequences of the variation, *we are of the view that the courts must always be strict in interpreting clauses in relation to variation if the variation is in writing or the courts had to scrutinise the 11 conduct of the parties if the variation is by conduct.* See the decision of Abdul Malik Ishak J in *Tahan Steel Corp Sdn Bhd v Bank Islam Malaysia BHD* [2004] 6 MLJ 1; [2004] 6 CLJ 131. (Emphasis added.)

[57] We also approve the decision in *Oakwell Engineering International Pte Ltd v PCM Feam (M) Sdn Bhd* [2014] 11 MLJ 175 (HC) below:

> [9] Be that as it may, the defendant went on to rely on the cases of *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 and *Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd* [1993] 3 MLJ 433 to bolster its position on collateral contracts. These cases do not however support the defendant's proposition because the collateral contracts that subsisted in those cases were collaterally entered during the formation of the principal contract. I find and hold that the alleged collateral agreement was instead an attempt by the defendant to argue there was a variation to the payment terms in the supply contract during the tail end of the performance of the supply contract. *The variation must however be supported by valuable consideration. This requirement for consideration is set out in the textbook Chitty on Contracts (Vol 1 — General Principles) (31st Ed), at para 22–035 that The agreement which varies the terms of an existing contract must be supported by consideration. In many cases, consideration can be found in the mutual abandonment of the existing rights or the conferment of new benefits by each party on the other'. The time for payment by the defendant to the plaintiff in this case has allegedly been postponed without any benefit accruing to the plaintiff. In such premise, the collateral agreement, if any, is also void for want of consideration following s 26 of the Contracts Act 1950.* (Emphasis added.)

[58] Turning to the facts of the present case, we have gone through ADW2 with a fine-tooth comb and ultimately agree with the plaintiff that there is no consideration from the defendant to the plaintiff for the interest rate increase.

[59] In *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)* [2014] 3 MLJ 785, the plaintiff claimed against the defendant the consultancy fees (based on ten consultancy agreements entered between the plaintiff and other parties) which was claimed to be payable by the defendant to the plaintiff based on an alleged collateral agreement (attempted to be proven through conduct and other documents).

[60] Evidence, in this case, has shown that through the conduct, practice and documents, there was an agreement between the plaintiff and the defendant that the defendant would give instructions and notify the plaintiff of the value of what was supposed to be deliveries that had been made to the end customers of the defendant and after that inform and instruct the plaintiff of the figures based on the supposed value of deliveries.

[61] However, the Court of Appeal dismissed the plaintiff's claim and stated, among others, that the alleged collateral contract was void for want of consideration. The Federal Court, agreeing with the Court of Appeal, held as follows:

> [71] We agree with the Court of Appeal that even if the plaintiff had succeeded in establishing the existence of the collateral contract as alleged, such contract was void for want of consideration. *Under s 26 of the Contracts Act 1950 it is provided that agreement without consideration is void unless it comes under one of the exceptions.* From PW1's evidence there was nothing to show that consideration was given by the plaintiff for the defendant to furnish the required information. *We are aware that under the consultancy agreements the plaintiff was required to provide consultancy services for the benefit of the defendant. But that was the consideration for the consultancy agreements and not for the alleged collateral agreement and also the consultancy services were not rendered at the defendant's request.* (Emphasis added.)

[62] Similarly, in the present appeal before us, we are of the view that the parties already agreed that the plaintiff was to pay for the additional works to be carried out by the defendant in the agreed sum under ADW1 plus 5% interest per annum. This is the consideration in ADW1 and not in ADW2. There is no mention of any consideration on the defendant's part in ADW2.

[63] If we go by the defendant's pleaded defence that the interest rate increase in ADW2 was due to the financial difficulties faced by the defendant having to complete additional works under the NADW, this argument will also fail since there is already a valid consideration in NADW which is the agreed payment on the part of the plaintiff for works completed by the defendant.

[64] Next, in *Sritharan Naidu a/l Sundara Rajoo v Dato' Dr Gengatharan @ Jeganathan a/l Venkatesan & Anor* [2019] MLJU 289; [2019] 1 LNS 535, the defendant was sued by his uncle (first plaintiff) and aunt (second plaintiff) for the balance sum of RM660,000 being a part of the loan took out on the defendant's name for the benefit of the first defendant upon the aunt's property being used as collateral for the loan. The loan defaulted immediately, with the first plaintiff never servicing the repayments.

[65] Her Ladyship, Mary Lim Thiam Suan JCA (now FCJ), speaking for this court, reiterated the fundamental principle in contract laws in the following words:

> [34] *It is a fundamental principle in the law of contracts that every agreement can only exists in law if there is consideration.* This is clearly provided in s 26 of the Contracts Act 1950 and the position is the same under common law. *An agreement made without consideration is void unless it falls under the either of the four exceptions in* s 26. The nephew had made the assertion on what the consideration is while the uncle and aunt denies it, without suggesting any in its place. This pleaded issue was raised in submissions too but was not responded to by the plaintiffs nor addressed by the learned judge. It was again raised in this appeal; and again, there is no response from the respondents. We find it most material and crucial that this question be resolved before we can proceed to the other issues in the appeal. (Emphasis added.)

[66] It was further held as follows:

> [39] So, we are left with this simple but most fundamental question of *what is the consideration for the nephew in agreeing to take the loan from OCBC for the uncle.* In the uncle's own pleaded case, and in the whole trial that was conducted and in the submissions maintained before us, there is none. In fact, at para 9 of the amended statement of claim, the plea is that the nephew had agreed to his uncle's request and to take the loan, 'without any reservation or qualification'. The question is, is that enough? In our view, the answer is in the negative.
>
> [40] *Although past consideration is valid consideration and the value of the consideration is irrelevant, it remains that there must be consideration. The consideration must move from the uncle and/or the aunt to the nephew. Put simply, what was it in the arrangement for the nephew? What was the nephew to receive in return for agreeing to lend his name and to become the borrower for his uncle?*
>
> [41] We have tried to rationalize what that consideration might be, but we are unable to discern any. As mentioned, *the third party charge is not consideration for the purpose of the oral contract between the uncle, aunt and the nephew.* And, it is that oral contract which the uncle seeks to enforce before the court. (Emphasis added.)

[67] Similarly, in the present appeal before us, the question to be asked is this: what will the plaintiff receive in return for agreeing to increase the interest rate for the defendant's benefit in ADW2? This question remains unanswered.

[68] In a nutshell, we agree with the plaintiff that ADW2 was executed to vary the interest chargeable by the defendant under ADW1 from 5%pa to 7.5%pa. As a result, the plaintiff is required to make an additional payment of RM49.367m to the defendant in July 2011 for works that the defendant was already obliged to carry out under the ADW1, which the plaintiff had already agreed to pay a total of RM677.123m for. However, there was no consideration from the defendant to the plaintiff in ADW2. Therefore, ADW2 is void and unenforceable for want of consideration under s 26 of the CA 1950.

[69] Therefore, we also find merits in this issue, which the plaintiff raised.

Third issue: Defendant's financial difficulties

[70] Concerning this issue, we are of the view that the learned HCJ erred in putting too much emphasis on the irrelevant fact that the parties' intention in entering into ADW2 was to alleviate the financial difficulties faced by the defendant in carrying out the additional works.

[71] Firstly, there was nothing of the sort mentioned in ADW2, even in the Recitals. Secondly, even if the plaintiff agreed to alleviate the defendant's financial difficulties, there is still no mention of what the plaintiff should get in return as consideration from the defendant in ADW2.

[72] As such, we also find merits in this issue.

Fourth issue: estoppel

[73] With regard to this issue, the defendant contended that the plaintiff is estopped from challenging the validity of ADW2 since the plaintiff has agreed, in its own volition, to enter into ADW2 with the defendant.

[74] The Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, had cited the following passage of Lord Denning MR's judgment in the UK Court of Appeal's case of *Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commerce International Bank Ltd [1979 A No 65]* [1982] QB 84 with approval, namely:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. *It has evolved during the last 150 years in a sequence of separate developments:* proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. *At the same time it has been sought to be limited by a series of maxims:* estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, *estoppel cannot do away with the need for*

> *consideration,* and so forth. All these can now be seen to merge into one general principle shorn of limitations. *When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so.* If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands. (Emphasis added.)

[75] It is also trite that estoppel is an equitable principle and cannot be used to defeat clear statutory provisions of the law. Ramly Ali FCJ (as he then was) in delivering the judgment of the Federal Court in *Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Anor* [2016] 5 MLJ 1; [2016] 7 CLJ 823, held as follows:

> Estoppel
>
> [57] The issue of estoppel was also raised by the defendant. The defendant argued that the first plaintiff had accepted the defendant's payment of the full purchase price for all the 12 shop lots and never evinced any intention to refund the same. By that conduct, the defendant claimed that the first plaintiff was estopped from relying on s 293 of the CA as an instrument of fraud to prevent the defendant from receiving the properties which it had paid for.
>
> [58] Our view is that the plaintiffs' claim is based on statutory provisions of s 293 of the CA read together with s 52 of the BA. These statutory provisions, as we have discussed earlier, are clear and unambiguous. *Estoppel, being an equitable principle cannot operate to defeat clear statutory provisions of law.* This settled principle of law was adopted by Edgar Joseph Jr in *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352b when His Lordship ruled that: 'The defence of estoppel accordingly fails *since there cannot be an estoppel to evade the plain provisions of a statute* ... particularly when the non-compliance goes to the root of the thing'. (Emphasis added.)

[76] This principle was also followed by the Court of Appeal in *Vignesh Naidu a/l Kuppusamy Naidu v Prema Bonanza Sdn Bhd and another appeal* [2023] 2 MLJ 776; [2023] 4 CLJ 715.

[77] Hence, we agree with the plaintiff that the doctrine of estoppel which the defendant raised cannot operate against the clear requirement for consideration in a valid contract as statutorily provided under s 26 of the CA 1950 unless the contract falls under any of the exceptions mentioned therein, which is not the case here. Therefore, the plaintiff in the present case is not estopped nor precluded from raising this issue to challenge the validity of ADW2.

CONCLUSION

[78] In conclusion, after careful perusal of the appeal records and after hearing the submissions by both parties to this appeal, we have reached a unanimous decision that there are merits to the plaintiff's appeal which warrant appellate intervention. We allow the plaintiff's appeal with cost and set aside the decision of the learned HCJ. Consequentially, prayer (9)(a) of the plaintiff's statement of claim is allowed, and any payment made to the respondent by the plaintiff under the void agreement is to be refunded. Costs of RM120,000 here and below to be paid by the defendant to the plaintiff subject to allocatur.

Appeal allowed with costs; HCJ's decision set aside; any payment made to defendant by plaintiff under void agreement refunded.

Reported by Dzulqarnain Ab Fatar